

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

A.O.NO.539 OF 2005

IN

N.M.423 OF 2005

IN

S.C.SUIT NO.5996 OF 1985

Shanta N. Shah & Ors .. Appellants

vs.

Tejbai Tejsi & Ors. .. Respondents

Mr.N.V.Walawalkar i/b. Zohair & Co. for the Appellant.

Mr.P.K.Dhakephalkar for Respondent No.3.

CORAM : A.S.OKA, J.

DATED : 2nd May, 2005.

P.C. :

1. Admit. The Respondent No.4 waives service. Service on Respondent Nos. 1 to 3 is dispensed with. Considering the facts and circumstances of the case, taken up for hearing forthwith. The Appeal is by the Original Plaintiff for challenging the impugned judgment and order dated 4th March, 2005. By the impugned Judgment and Order, the learned trial Judge has exercised powers under Order

39 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the said Code') and has dismissed the suit filed by the Appellant-Plaintiff.

2. The Respondent No.4 had taken out the Chamber Summons for impleading him as party Defendant in the suit filed by the Appellant. By Order dated 1st September, 2004 the Chamber Summons was allowed and the Respondent No.4 was directed to be impleaded as a party Defendant. The Appellant failed to carry out amendment on the basis of order dated 1st September, 2004 and that is the reason why a Notice of Motion was taken out by Respondent No.4 praying for dismissal of the suit filed by the Appellant under Order 39 Rule 11 of the said Code.

3. Shri Walawalkar, learned Counsel appearing for the Appellants submitted that the amendment was not carried out on the basis of order dated 1st September, 2004 as at that time the Appellants were contemplating of challenging the said order. He states that now the Appellants are not desirous of challenging the said order and the Appellants are ready and willing to carry out the amendment for implementing the order dated 1st September, 2004. Shri Walavalkar brought to my notice that the

learned trial Judge while passing the impugned order has relied upon a decision of the learned Single Judge of this Court reported in 1996 (1) Mah. L.J. page 76 (Ratnakar D. Patade V/s. Smita Pandurang Dalvi & Others) which has been expressly overruled by a recent judgment of the Division Bench of this Court reported in 2004 (Supplementary 2) Bombay Cases Reporter page 298 (Ramavatar Surajmal Modi V/s. Mulchand Modi). He submitted that the law laid down by the Division Bench is very clear that the provision of Order 39 Rule 11 of the said Code is directory and not mandatory. He, therefore, submitted that in every case of breach of an order, an order under Rule 11 of Order 39 of the code cannot be mechanically passed.

4. Shri Dhakephalkar, appearing for the Respondent No.4 submitted that initially the Appellants applied for extension of time to carry out the amendment. The said Prayer made by the Appellant was not granted. The Appellants did not challenge the order dated 1st September, 2004 within a reasonable time and that is the reason why the learned trial Judge has passed the order impugned in this Appeal. He submitted that no interference was called for.

5. Perusal of the decision of the Division Bench in the case of Ramavatar Surajmal Modi shows that the learned trial Judge has relied upon the decision of the learned Single Judge of this Court which is no longer a good law. The learned Judge proceeded on an incorrect assumption that the provisions of rule 11 of Order 39 of the said code are mandatory. The entire approach of the learned trial Judge was erroneous. The impugned order is therefore unsustainable. Now the Appellants have stated that they will carry out the amendment in terms of order dated 1st September, 2004. In view of this position, in the facts and circumstances of the case, the suit filed by the Appellants cannot be dismissed under Order 39 Rule 11 of the said code. Shri Walawalkar states that the Appellants will carry out the amendment on or before 10th June, 2005. The statement is accepted.

6. The Respondent No.4 has suffered prejudice because of delay on part of the Appellants in carrying out the amendment and therefore the Respondent No.4 will have to be compensated by ordering payment of reasonable costs. The amount of costs is quantified at Rs.7,500/- which will be

payable by the Appellant on or before 10th June, 2005.

7. Hence I pass the following order:

1) The impugned Judgment and Order dated 4th March, 2004 is quashed and set aside and the Notice of Motion No. 423 of 2005 stands dismissed subject to the condition that

a) The Appellants will carry out the necessary amendment to the plaint for impleading the Respondent No.4 as a party on or before 10th June 2005.

b) The Appellants will pay a sum of Rs.7500/- (Rupees Seven Thousand Five Hundred Only) by way of costs to the Respondent No.4 on or before 10th June, 2005.

2) In case the Appellants do not comply with the aforesaid conditions, liberty to apply to the trial Court under Rule 11 of Order 39 of the said Code.

Appeal is allowed in above terms with no order as to costs.

Parties to act on the authenticated copy of this order.

(A.S.Oka, J.)